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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band for Fixed Service	)	ET Docket 97-99

JOINT SURREPLY

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SUMMARY

In their Replies, BellSouth Corporation ("BellSouth"), DIRECTV Enterprises, Inc. ("DIRECTV"), Millimeter Wave Carrier Association, Inc. ("MWCA"), WebCel Communications, Inc. ("WebCel") and WinStar Communications, Inc. ("WinStar") (collectively the "Petitioners") introduce new erroneous legal arguments and technical claims.

WinStar's Reply in particular advances a number of flawed technical claims, and introduces a technical study into the record that ignores the underlying goal of the *DEMS Relocation Order* -- to relocate the existing DEMS service in a manner that provides equivalent operations at 24 GHz. WinStar's study makes inappropriate non-technical business judgments that, if implemented, would render 24 GHz DEMS licensees unable to compete effectively, and makes invalid assumptions about the technical feasibility of certain DEMS design elements and system components. In addition, WinStar's claim that it has a valid 18 GHz DEMS license is false. Indeed, its "waiver request" filed separately with the Commission confirms that neither it nor its predecessor-in-interest ever timely constructed the once-authorized facilities. Accordingly, WinStar's license terminated long before the 18 GHz channel in question was subsequently licensed to MSI.

In addition, there is no evidence that the Teledesic 18 GHz band sharing controversy influenced in any way NTIA's DEMS relocation request. In a desperate attempt to support this claim, BellSouth fundamentally distorts the testimony of Larry Irving, the Assistant Secretary of Commerce for Telecommunications and Information, during the recent House reauthorization hearing for the National Telecommunications and Information Administration ("NTIA"). Despite BellSouth's deceptive references to Mr. Irving's

testimony, a review of Mr. Irving's unadulterated comments confirms that NTIA's DEMS relocation requests were motivated solely by the need to eliminate interference from DEMS facilities to military earth stations in the 18 GHz band.

Finally, Petitioners misinterpret the national security exception of the Administrative Procedure Act. The Commission's rationale for having initiated a separate notice of proposed rulemaking ("NPRM") in *Bendix Aviation Corporation v. FCC* ("*Bendix*") is inapplicable to the relocation of DEMS to the 24 GHz band. In *Bendix*, the government had *no immediate need* to use the new spectrum for which it had sought a Commission reallocation. Moreover, because the future potential interference resulting from the reallocation was to the commercial licensees and not the government facilities, the transition period from the co-primary allocation to a government-only allocation posed no threat to national security. By contrast, here, the Government *did* claim an immediate need for the *exclusive use* of the 18 GHz band to eliminate interference to government satellite systems that threatened national security. The NTIA, on behalf of the Department of Defense ("DoD"), requested the *immediate*, national relocation of DEMS to the 24 GHz band to eliminate the risk of imminent harmful interference from 18 GHz commercial DEMS stations to existing and future military earth stations -- interference that NTIA and DoD determined threatened national security. The Commission was prohibited by applicable law from simply suspending or revoking the licensed DEMS operations that threatened government satellite operations. Thus, the relocation of DEMS *to* the 24 GHz band was inextricably linked to the relocation of DEMS *from* the 18 GHz band because the Commission could not undermine NTIA's national security request or deprive DEMS licensees of their statutory rights.

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To: The Commission

JOINT SURREPLY

Digital Services Corporation ("DSC"), Microwave Services, Inc. ("MSI") and Teligent, L.L.C. ("Teligent," formerly Associated Communications, L.L.C.) (collectively, the "DEMS Licensees"),[1] by their attorneys, hereby jointly file this Surreply to the Replies of BellSouth Corporation ("BellSouth"), DIRECTV Enterprises, Inc. ("DIRECTV"), Millimeter Wave Carrier Association, Inc. ("MWCA"), WebCel Communications, Inc. ("WebCel"), and WinStar Communications, Inc. ("WinStar") (collectively the "Replies") in the above-captioned proceeding. On June 5, 1997, BellSouth, DIRECTV, MWCA, WebCel and WinStar (collectively, the "Petitioners") filed Petitions for Reconsideration against the Commission's *DEMS Relocation Order*,[2] in which the Commission relocated DEMS licensees

[1]For purposes hereof, all references to the entity formerly known as "Associated Communications" will be to "Teligent."

[2]*Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service, Order*, 12 FCC Rcd 3471 (1997)("*DEMS Relocation Order*").

from the 18 GHz band to the 24 GHz band in response to a request from the National Telecommunications and Information Administration ("NTIA"), acting on behalf of the Department of Defense, to accommodate vital national security concerns. On July 8, 1997, the DEMS Licensees filed a Joint Opposition to these Petitions and Teledesic Corporation ("Teledesic") filed its own opposition to the Petitions.

I. WINSTAR MAKES ERRONEOUS TECHNICAL CLAIMS IN ITS REPLY

WinStar's Reply, and particularly the technical study by Hatfield Associates, Inc. ("Hatfield") included as an exhibit thereto, contain a number of flawed technical claims. These claims are addressed in detail in the "Response to Technical Assessment," attached hereto as Exhibit I.

In general, the attached "Response to Technical Assessment" demonstrates several fatal defects in the Hatfield study. First, the study ignores the underlying goal of the Commission decision, which was to relocate the existing DEMS radio service from 18 GHz to 24 GHz "and provide [for] equivalent operations at 24 GHz."[3] A redesigned 24 GHz DEMS system cannot be considered in isolation -- the transition from the baseline DEMS design in the 18 GHz band to an equivalent service in the 24 GHz band is the *key issue* in the Commission's technical analysis and decision. Contrary to WinStar's approach, any technical considerations for DEMS service at 24 GHz must ensure that DEMS technical specifications and service characteristics at 24 GHz are at least comparable to those at 18 GHz.[4]

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[3] *Id.* at 3486, Appendix B.

[4] *See* DEMS Licensees' Joint Opposition at 25-27.

Second, the Technical Assessment observes that the Hatfield study makes inappropriate and erroneous non-technical business judgments that, if implemented, would render 24 GHz DEMS licensees unable to compete effectively. For example, the 99.7% rain availability rate that the Hatfield study proposes would cause DEMS customers to suffer outages for 26 *hours* per year. In contrast, WinStar itself advertises a 99.999% availability factor, which yields only 5.2 minutes of outage per year.[5] Thus, it is not at all surprising that WinStar would urge the Commission to impose a prohibitively lower availability factor on its major competitors. In short, WinStar's proposal would make it impossible to market DEMS as a viable competitor in the local exchange marketplace.

Third, the Hatfield study makes invalid assumptions about the technical feasibility of certain DEMS design elements and system components (e.g., increased transmitter power and antenna gain) and misinterprets documentation relied on by the Commission. Yet to the extent such transmitter power and antenna gain changes were an easy solution to the capacity problem at 24 GHz, then they would have been implemented at 18 GHz, thereby establishing an even larger 18 GHz system capacity which would in turn still be obtainable at 24 GHz only by increasing the spectrum allocation. In sum, the attached Technical Assessment fully refutes the Hatfield study's attacks on the Commission's analysis and decision to allocate 400 MHz of spectrum for DEMS in the 24 GHz band.

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[5]*See* Attachment A to Exhibit I hereto.

II. THERE IS NO EVIDENCE THAT THE TELEDESIC 18 GHZ BAND SHARING CONTROVERSY INFLUENCED NTIA'S DEMS RELOCATION REQUEST

A number of Petitioners reiterate the implausible claim from their initial Petitions that the DEMS relocation was effectuated merely to appease the interests of Teledesic, which had insisted that it could not co-exist in the 18 GHz band with DEMS facilities. For example, in its Reply, BellSouth excerpted portions of the testimony of Larry Irving in response to questions concerning the DEMS relocation during a hearing before the U.S. House of Representatives.[6] BellSouth fundamentally distorts Mr. Irving's comments, claiming that Mr. Irving's testimony "seems to show that two companies -- Teledesic and Teligent -- had a spectrum interference problem that the FCC attempted to solve by approaching NTIA."[7]

BellSouth's interpretation of this testimony is incorrect. Mr. Irving's testimony is wholly consistent with the Commission's *DEMS Relocation Order*. When Mr. Irving stated "[y]ou had some competing uses and they couldn't both fit in the same area,"[8] he was referring to DEMS and the military satellite earth stations, and not to the Teledesic/DEMS band sharing matter. Similarly, when Mr. Irving stated that the Commission "came to us and said, we have to move somebody; is there a place you can move them

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[6]BellSouth Reply at 6-7.

[7]*Id.* at 7.

[8]Reauthorization of the National Telecommunications and Information Administration: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 105th Cong., 1st Sess., 77 (1997) (statement of Larring Irving, Assistant Secretary for Communications and Information, National Telecommunications and Information Administration, Department of Commerce) ("Statement of Larry Irving").

to,"[9] he was referring to the Commission's need to relocate DEMS in order to comply with NTIA's request to eliminate interference from DEMS facilities to government earth stations in the 18 GHz band. His subsequent sentence makes it clear that this is the most plausible interpretation: "We had to make the move nationally, however, because all of the equipment the military used was national equipment and it had to be useful anywhere."[10]

BellSouth's mischaracterization of Mr. Irving's testimony is further clarified by reference to the portions of his testimony that BellSouth opted to exclude from its Reply. For example, in the course of responding to Congressman Largent's questions about the DEMS relocation, Mr. Irving made the following comments, clarifying that NTIA's principal concern was to obtain primary status in the 18 GHz band vis-a-vis DEMS licensees:

> We moved our people to other bands that we already had, and we have lots of shared uses and there are occasions when we move from primary to secondary status. There are occasions when we ask for primary status working with the FCC. All this was a change in status. It was a shared spectrum. We didn't have exclusive use, as I understand it.[11]

In referencing NTIA's request for "primary status" from the Commission, Mr. Irving is addressing NTIA's request for the Commission to relocate DEMS and resolve the military earth station/DEMS band sharing matter. These references do not reflect an attempt on the part of NTIA to "trigger the national security exemption in order to resolve a spectrum

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[9] *Id.* at 78.

[10] *Id.* at 78. The entire portion of Mr. Irving's testimony on the DEMS relocation subject is attached as Exhibit II.

[11] *Id.*

dispute between two private parties."[12]

Moreover, BellSouth's implication that NTIA inappropriately "'loaned'" its "privilege of invoking the national security exemption"[13] to the Commission fundamentally misconstrues the facts involved in this proceeding. Far from effectuating the DEMS relocation on its own motion, the Commission did exactly what the NTIA asked it to do, precisely the way in which NTIA asked it to be done. BellSouth ignores NTIA's repeated requests to relocate DEMS from the 18 GHz band to the 24 GHz band to protect national security interests. It also denigrates the deference that the Commission owes the NTIA when the latter agency invokes the national security exception to the APA.[14] In fact, if anything, BellSouth appears to advocate a regulatory regime under which the Commission could second-guess and countermand NTIA's invocations of the APA's military function exception -- a result that would be directly at odds with the statute's objectives.

III. WEBCEL'S CHALLENGE TO THE VALIDITY OF THE DEMS LICENSES IS STALE AND MERITLESS

As a desperate and reckless attempt to cast doubt on the integrity of the Commission's processes, WebCel in its Reply continues to make the patently false claim that

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[12]*See* BellSouth Reply at 8.

[13]*Id.*

[14]In addition, MWCA's argument that the DEMS Licensees somehow failed to comply with the Commission's *ex parte* rules in the DEMS relocation proceeding is illusory. *See* MWCA Reply at 6, n.5. *See also* BellSouth Reply at 9-10. The documents to which MWCA refers in its Reply reflect all of the presentations (and more than summarize the accompanying oral presentations) made by the DEMS Licensees to the Commission on the spectrum needs of the DEMS licensees upon relocation to the 24 GHz band. Since the Commission had placed these materials in the public record prior to its release of the June 19 Public Notice on DEMS relocation *ex parte* rules, no further filings were required.

the Commission has "neglected responsibility to investigate and publicly resolve *prima facie* charges made against the validity of the DEMS licenses."[15] As support, WebCel notes that the Commission did not issue letters confirming the conclusion of the Commission's inquiry into MSI's and DSC's construction and operation of their DEMS systems until April 1997, after the *DEMS Relocation Order* was issued.[16]

Contrary to WebCel's mischaracterization, the Commission's investigation into the validity of the DEMS Licensees' licenses ended months before the Commission notified MSI and DSC by letter that the investigation was terminated. On November 2, 1996, the Wireless Bureau's Enforcement Division initiated its investigation under Section 308(b) of the Communications Act and began on-site inspections of every DSC and MSI DEMS facility. This investigation continued through 1996, coming to a close well *before* the release of the *DEMS Relocation Order*.

As another example of the extremes to which it will go to impede competition, WebCel in its Reply once again resurrects its stale claim that MSI and DSC "inappropriately obtained multiple licenses in the same standard metropolitan area ("SMSA") in violation of the Commission rules."[17] It disputes MSI's claim in the Joint Opposition that it was granted waivers to construct and operate multiple DEMS channel systems in 25 of its 27 SMSAs, and

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[15]WebCel Reply at 2.

[16]*Id.* *See* Letter from Howard C. Davenport, Chief of the Enforcement Division of the Wireless Telecommunications Bureau, to Jay L. Birnbaum, Counsel for MSI, dated April 2, 1997, and Letter from Howard C. Davenport to Hal B. Perkins, Counsel for DSC, dated April 8, 1997.

[17]WebCel Reply at 3.

suggests that the *DEMS Relocation Order* somehow expands the DEMS Licensees' multiple channel waivers. It also contends that MSI "mysteriously cites as evidence only one *application* for licenses *filed by MSI* in Pittsburgh . . . and pointedly cannot rely on *any* Commission Order (or even Staff letter) actually granting these waivers."[18]

WebCel's attempt to distort the plain facts is merely an effort to retroactively attack MSI's and DSC's multiple channel waiver applications long after its opportunity to have filed such challenges lapsed. MSI cited one application in support of its multiple channel waiver applications simply as *an example*. The Commission's records reflect that each MSI application involving multiple channels was accompanied by appropriate waiver requests. No matter how much WebCel engages in a game of "harassment by petition," the truth remains that DSC and MSI obtained their respective 18 GHz DEMS licenses pursuant to well-established application and public notice procedures and have since timely constructed their DEMS systems and commenced service in accordance with the Commission's rules. The *DEMS Relocation Order* has nothing whatsoever to do with the DSC and MSI waiver requests and the Commission should reject WebCel's attempt to shoehorn its belated attack on those requests into the *DEMS Relocation Order*.

IV. WINSTAR'S CLAIM THAT IT HAS AN 18 GHz DEMS LICENSE IS FALSE

In its Reply, WinStar attempts to buttress its earlier claim that it has a long lost 18 GHz DEMS license it acquired from Local Area Telecommunications, Inc. ("LOCATE"). All evidence available from the Commission's and other databases undermines WinStar's claim. Although WinStar appears to be correct in claiming that LOCATE

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[18] *Id.*

obtained an 18 GHz DEMS license, that license was granted on May 29, 1987, over 10 years ago, and is no longer valid. In renewing its DEMS licenses, LOCATE renewed only its 10 GHz license under call sign WHD251.[19] The Commission public notices indicate that the renewal granted for WHD251 in Atlanta is for a DEMS license only on Channel 9, which is in the 10 GHz band.[20]

Second, until WinStar filed its Reply, in no instance in the 10 years since LOCATE's 18 GHz license in Atlanta was granted have either LOCATE or WinStar claimed or demonstrated that 18 GHz facilities were constructed under call sign WHD251. Nor had LOCATE filed an 18 GHz completion of construction notice with the Commission. Additionally, neither LOCATE nor WinStar ever raised any objection to either the application or grant of MSI's DEMS license for the same channel in the Atlanta market. Currently, the Commission's and ComSearch's databases, the Interactive Systems, Inc. database, and research by International Transcription Services confirm that WHD251 in Atlanta is licensed to WinStar only on Channel 9. Thus, the veracity of WinStar's exhibit purporting to depict LOCATE having a valid 18 GHz license is quite suspect.[21]

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[19]*See* Public Notices of March 13, November 27 and December 11, 1991 (Report Nos. D-583, D-620-A and D-622-A attached hereto as Exhibit III).

[20]*See Use of Radio in Digital Termination System for the Provision of Digital Communications Services*, 86 FCC 2d 360, 399-400 (1981). The renewal authorization for WHD251 attached to WinStar's Reply fails to specify the station's authorized frequency (or even specify any constructed facilities almost three years after the 18 GHz license had been issued to LOCATE). Despite WinStar's months of due diligence, it apparently either overlooked the fact that its 18 GHz license terminated long ago or incorrectly assumed that the Commission would be unable to recreate the events that led to such termination and LOCATE's failure to renew its 18 GHz license under call sign WHD251.

[21]*See* WinStar Reply at Exhibit II.

Finally, WinStar has "filed with the Commission a request for waiver and a notice of equipment change."[22] WinStar chose not to serve a copy of this waiver request on MSI, the exclusive licensee in the Atlanta market on DEMS Channel 33. In any event, WinStar's request confirms that neither WinStar nor LOCATE had ever timely constructed 18 GHz DEMS facilities in Atlanta. Further, the request must be rejected since WinStar has no basis for waiver of a rule that terminated LOCATE's license *automatically* eight and a half years ago due to the failure to construct facilities on a timely basis or the subsequent failure to renew the license less than two years after its construction deadline expired.[23] Thus, if in fact WinStar has, as it suggests in its Reply and its waiver request, recently constructed 18 GHz facilities in the Atlanta DEMS market, such construction would be unauthorized and a violation of Section 301 of the Communications Act and Section 101.501 et seq., of the Commission's rules, and would warrant among the harshest penalties the Commission may impose under its rules.[24]

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[22]*See* Winstar Reply at 5.

[23]Commission staff in Gettysburg have confirmed to counsel for MSI as recently as August 5, 1997 that the 18 GHz license issued to LOCATE under call sign WHD251 terminated automatically -- and the license was purged from the Commission's database -- because no notice of construction of authorized 18 GHz facilities was ever filed. This is consistent with MSI's routine searching of the Commission's and other available databases that, as early as December 1993 when MSI filed its application for channel 33 in the Atlanta DEMS market, have revealed no valid 18 GHz license outstanding for DEMS channel 33 in Atlanta other than the one held by MSI.

[24]*See Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, CI Dckt. No. 95-6, FCC 97-218, *Report and Order* at Appendix A, § I (rel. July 28, 1997).

V. PETITIONERS MISINTERPRET THE APA'S NATIONAL SECURITY EXCEPTION

Petitioners mischaracterize the national security exception of the Administrative Procedure Act ("APA"),[25] arguing that the exception did not extend to the nationwide relocation of DEMS from the 18.82-18.92 GHz and 19.16-19.26 GHz bands ("18 GHz band") to the 24.25-24.24 and 25.05-25.25 GHz bands ("24 GHz band"). For example, MWCA contends that the DEMS relocation to 24 GHz was "entirely severable"[26] from NTIA's request, which it claims required the Commission only to cause "DEMS incumbents immediately to cease operations in Washington, D.C. and Denver, Colorado, where military earth stations are currently located and, in the future, to cease all operations in the 18 GHz band as the military deploys additional facilities."[27]

A. An Imminent Threat to National Security Necessitated the Immediate Relocation of DEMS to the 24 GHz Band

The Petitioners continue to misconstrue *Bendix Aviation Corporation v. FCC* ("*Bendix*")[28] and *Independent Guard Association of Nevada v. O'Leary* ("*O'Leary*").[29] Several Petitioners argue that the Commission should have issued a notice of proposed rulemaking ("NPRM") regarding DEMS relocation similar to the NPRM at issue in the

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[25]5 U.S.C. § 553(a). The Commission's rules also contain a "military function" exception. *See* 47 C.F.R. § 1.412(b).

[26]MWCA Application at 12, *see also* MCWA Reply at 14.

[27]*Id.* at 14. *See also* BellSouth Reply at 2-3.

[28]272 F.2d 533, 541 (D.C. Cir. 1950), *cert. denied sub nom. Aeronautical Radio, Inc. v. United States,* 361 U.S. 965 (1960).

[29]57 F.3d 766 (9th Cir. 1995).

underlying *Bendix* proceeding.[30] The principal difference between *Bendix* and the DEMS relocation, however, is that in the DEMS relocation the government claimed an *immediate* need for the *exclusive use* of the 18 GHz band to eliminate interference from DEMS systems to government satellite systems that threatened national security. Because the Communications Act and Commission precedent precluded the Commission from effectively cancelling DEMS licenses, even temporarily,[31] the Commission was required immediately to find replacement spectrum for DEMS in order to satisfy NTIA's national security concerns.

Accordingly, the Commission's rationale for having initiated a separate rulemaking proceeding in Bendix is inapplicable to the instant case. As discussed in more detail immediately below, in *Bendix* the government had *no immediate need* to use the new spectrum for which it had sought a Commission reallocation. Thus, there was no immediate interference of any kind that would result from the Commission's reallocation of the doppler radar band for government use. Moreover, because the future potential interference resulting from the reallocation was to the commercial licensees and not the government facilities, the transition period from the co-primary allocation to a government-only allocation posed no

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[30]*See* MWCA Reply at 7, DIRECTV Consolidated Reply at 8-9.

[31]As previously demonstrated, *see* Joint Opposition at 10-11, there is no Commission precedent for the revocation or suspension of a Commission license on any basis other than the licensee's intentional wrongdoing or non-compliance with applicable rules. Such a suspension or revocation would violate the licensing standards prescribed in the Communications Act of 1934, as amended, which enable the Commission to revoke or suspend a license only upon licensee wrongdoing or misconduct. *See* 47 U.S.C. § 303(m) (delineating the Commission's license suspension authority); 47 U.S.C. § 312 (delineating the Commission's license revocation authority); *see also Revocation of License of Bernard J. Winner, et al.*, 102 FCC 2d 102 (Rev. Bd. 1981) (refusing to "terminat[e] . . . licenses prior to their normal expiration, without any finding that they have been misused.").

threat to national security.

Specifically, in *Bendix* the Commission faced a request for additional radiopositioning spectrum from the Office of Defense Mobilization ("ODM"), an Executive Branch agency charged with military intelligence functions.[32] The Commission acknowledged that "[t]he reallocation of frequency bands for Government use is stated to be essential to fill radiopositioning requirements," and that "vital national defense considerations make it mandatory that provisions be made now in the allocation table for these requirements."[33] These underlying national security considerations, however, did not require the immediate relocation of commercial licensees out of the bands reallocated for government use because the government did not immediately need to use such bands. As the *Bendix* Court noted: "The Executive had demanded that all potential users of the frequency in question be put upon immediate notice that *at some future date* the 8800 [MHz] frequency was to be exclusively Government."[34] Thus, the national security urgency in *Bendix* applied only to the reallocation of spectrum for government use and not to the related relocation of incumbent commercial users.

Thus, in *Bendix* the Commission had sufficient time to conduct a separate NPRM proceeding to make the doppler radar relocation band available "*at some future date*"

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[32]*Amendment of Parts 2, 4, 7, 8, 9, 10, 11, 12, 16 and 21 of the Commission's Rules and Regulations to Reallocate Certain Frequency Bands Above 25 Mc, Now Designated for Exclusive Amateur or Other Non-Government Use, to Government Services On a Shared or Exclusive Basis, and Conversely to Reallocate to Non-Government Use Certain Bands Now Designated for Government Use,* 17 R.R. 1505 (1958) ("*Bendix Order*").

[33]*Id.* at 1506.

[34]*Bendix*, 272 F.2d at 542 (emphasis added).

because there was no imminent national security threat that resulted from the reallocation. In fact, unlike in DEMS where for several markets relocation was immediate, in *Bendix* the Commission enabled 8 GHz doppler radar users to remain in the 8 GHz band until equipment was available in the relocation band.[35]

In contrast, prior to the DEMS relocation NTIA *twice* requested the *immediate* relocation of DEMS to the 24 GHz band to eliminate the risk of imminent harmful interference from 18 GHz DEMS stations to the military earth stations -- interference that NTIA and the Department of Defense determined threatened national security. Accordingly, whereas in *Bendix* interference at some future date would have potentially impaired commercial operations, in the DEMS relocation there was imminent interference to military satellite facilities that posed an immediate threat to national security. Per NTIA's repeated requests, the Commission acted expeditiously to resolve such national security issues consistent with its statutory obligations to regulate in the public interest and preserve licensed operations that had been fully compliant with Commission regulations. The Commission could not have issued a separate NPRM in the DEMS relocation proceeding to determine destination spectrum for 18 GHz DEMS licensees without subjecting military satellites to further interference, thereby further compromising national security, or suspending DEMS operations in three markets and portions of at least two others in violation of well-settled Commission precedent.[36] Recognizing this dilemma, in its March 5 letter to the Commission NTIA

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[35]*Id.* at 541.

[36]*See supra* note 31.

offered an "approach for resolving these problems"[37] that contemplated the relocation of the entire DEMS service to the 24 GHz band.

NTIA's approach was to make spectrum available specifically for the purpose of protecting existing and future government national security satellite facilities by relocating DEMS and directing that "the Commission take such steps as may be necessary to license DEMS in this spectrum . . . *on an expedited basis.*"[38] The relocation of DEMS *to* the 24 GHz band was inextricably linked to the relocation of DEMS *from* the 18 GHz band because the Commission could not undermine NTIA's national security request or deprive DEMS licensees of their statutory rights. In light of NTIA's repeated requests for expedited Commission relocation of DEMS from 18 GHz, it belies credulity for Petitioners to assert that, after the Commission had determined an appropriate method of relocation and after it had already given affected DEMS licensees separate 30-day notices regarding the relocation under Section 316 of the Communications Act, in March 1997 the Commission then should have issued an NPRM that would have delayed the relocation -- and continued to endanger military satellite operations -- for an additional, indefinite period of time.[39]

B. NTIA Requested a *Nationwide* DEMS Relocation

As the DEMS Licensees discussed in their Joint Opposition, although NTIA identified only two earth station facilities in its letters to the Commission, it did in fact

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[37] *Id.*

[38] *January 7, 1997 NTIA Letter* at 2 (emphasis added).

[39] *See, e.g.* MCWA Reply at 17-18, DIRECTV Consolidated Reply at 7, BellSouth Reply at 3.

request a national relocation of DEMS licensees to 24 GHz.[40] In fact, NTIA's letters specifically suggest that DEMS facilities outside Denver and Washington would interfere with military earth stations, expressing concern over DEMS "applications pending for additional authorizations" beyond these two areas.[41] Thus, Petitioners are fundamentally incorrect when they contend that the statement in NTIA's January 7, 1997 letter concerning the Commission's desire for a contiguous, national DEMS allocation evidences that the nationwide DEMS relocation to 24 GHz was not justified by national security concerns. Indeed, immediately after acknowledging the Commission's preference for a national, contiguous DEMS relocation, NTIA characterized that preference as a "common interest[]" and proceeded to make available 24 GHz spectrum for that purpose.[42]

Moreover, the testimony of Larry Irving, Assistant Secretary for Communications and Information at NTIA, before the U.S. House of Representatives, excerpted by BellSouth in its July 23, 1997 Reply in the DEMS relocation proceeding, makes clear that NTIA required a national DEMS relocation given the concern that military earth stations in the 18 GHz band would need to be free of harmful interference everywhere in the country:

> There were only two areas in which there was going to be an interference problem, as I understood it. *We had to make the move nationally, however, because all of the equipment the military used was national equipment and it had to be useful*

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[40]Joint Opposition at 3, 10-11, 17-20.

[41]*January 7, 1997 NTIA Letter* at 2.

[42]*Id.*

anywhere.[43]

C. The Decision In *O'Leary* Is Not Controlling

Finally, Petitioners are wrong that the Commission's actions in the DEMS relocation proceeding are analogous to those of the Department of Energy ("DoE") overturned in *O'Leary*.[44] In *O'Leary*, DoE invoked the national security exception in promulgating personnel certification requirements applicable to all DoE employees and independent contractors. The Independent Guard Association of Nevada ("IGAN"), a union representing civilian DoE guards, objected to the promulgation of these requirements without notice and comment and filed suit. In its defense, DoE did not contend that the guards themselves performed any military functions. Instead, it argued that the guards' "contractor support functions" were encompassed generally by the agency's own military functions (*e.g.*, the research and development of nuclear weapons).[45]

The Ninth Circuit disagreed, finding that "the [APA military function] exception can be invoked only where the activities being regulated directly involve a military function."[46] The Court found that the guards in question performed duties "similar to those

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[43]Reauthorization of the National Telecommunications and Information Administration, 1997: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 105th Cong., 1st Sess. 77-79 (1997)(statement of Larry Irving, Assistant Secretary for Communications and Information for the National Telecommunications and Information Administration) (emphasis added).

[44]*See, e.g.*, MWCA Reply at 15, MWCA Application at 12-16.

[45]*O'Leary*, 57 F.3d at 769.

[46]*Id.* at 770.

performed by civilian security guards everywhere."[47] The court found that although the DoE "can and does perform both 'civilian' and military' functions," the APA inquiry should not be directed to "whether the overall nature of the agency promulgating a regulation is 'civilian' or 'military,' *but to the function being regulated.*"[48] In other words, DoE did not show that the civilian guards in fact performed any of DoE's military functions and therefore the regulations, when applied to the guards, did not directly involve military functions.

In contrast to *O'Leary*, the Commission's relocation of DEMS to 24 GHz "directly involved a military function," namely the expedited elimination of interference to 18 GHz military satellite operations. Moreover, as stated earlier, although NTIA's requests enabled the Commission to forgo notice and comment, they in no way mitigated the Commission's statutory obligations to regulate in the public interest and refrain from revoking or suspending licenses absent wrongdoing by the licensees. To comply with these statutory obligations and accommodate NTIA's stated national security concerns, the Commission had no choice but to relocate DEMS to make possible the reallocation of the 18 GHz band for exclusive government use. Unlike in *O'Leary*, where no nexus between the "military function" rules and the guards' duties was established, the DEMS relocation to the 24 GHz band would not have been required *but for* NTIA's request that the Commission clear out the 18 GHz band for national security purposes.

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[47] *Id.*

[48] *Id.* at 769 (emphasis added).

CONCLUSION

For these reasons, the Commission should deny the Petitions for Reconsideration, Partial Reconsideration, and Clarification of the *DEMS Relocation Order*.

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EXHIBIT I

RESPONSE TO "TECHNICAL ASSESSMENT OF A RECENT FCC DECISION RELATING TO THE RELOCATION OF THE DEMS SERVICE FROM THE 18 GHZ BAND TO THE 24 GHZ BAND"

Prepared by Eric Barnhart, P.E., and Jeffrey Krauss, Ph.D.

Introduction

This is a response to the "Technical Assessment of a Recent FCC Decision Relating to the Relocation of the DEMS Service from the 18 GHz Band to the 24 GHz Band," prepared by Hatfield Associates ("the Hatfield Study"). Contrary to its title, the Hatfield Study is not a technical assessment of the decision. Rather, it is a review of textbook engineering principles applicable to radio communications services, which, when *properly* applied, reinforce the Commission's decision process and technical analysis in its *DEMS Relocation Order*.[1]

The Hatfield Study is seriously flawed because it ignores important differences between 18 GHz and 24 GHz propogation, employs biased assumptions in considering 24 GHz DEMS design and misinterprets documentation in the Commission's record.

First, the study ignores the underlying goal of the FCC decision in the *DEMS Relocation Order* to relocate DEMS from the 18 GHz band and provide *equivalent* operation at the 24 GHz band without causing irreparable harm to the providers or recipients of that service. The study proposes to redesign the 18 GHz baseline DEMS system to be much more costly (e.g. reduced cell radius, more Nodal Stations, and increased transmitter power) and to provide inferior performance (e.g., lower rain availability) as it is implemented at 24 GHz. A redesigned 24 GHz DEMS system cannot be considered in isolation--the transition from the baseline DEMS design in the 18 GHz band to an equivalent service in the 24 GHz band is *the* key issue in the Commission's technical analysis and decision.

Second, the study applies business judgments that lead to a service offering for 24 GHz DEMS that would be non-competi-

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[1] *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, 12 FCC Rcd 3471 (1997) ("*DEMS Relocation Order*").